**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Review of Section 251 Unbundling Obligations of | ) | |
| Incumbent Local Exchange Carriers | ) | |
| | ) | CC Docket No. 01-338 |
| New Petition for Forbearance of the Verizon | ) | |
| Telephone Companies Pursuant to 47 U.S.C. §160(c) | ) | |
| | ) | |

**REPLY COMMENTS OF THE**
**UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA),[1] through the undersigned and pursuant to the Public Notice[2] released by the Federal Communications Commission (FCC or Commission) and pursuant to sections 1.415 and 1.419 of the Commission's rules,[3] hereby submits its reply comments on the new Verizon Petition for Forbearance (New Petition).[4]

In its New Petition, Verizon seeks forbearance from any separate unbundling obligation that Section 271 of the Communications Act of 1934, as amended (Act), may be read to impose for broadband elements that the Commission has found do not have to be unbundled under

[1] USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

[2] Public Notice, CC Docket No. 01-338, FCC 03-263 (rel. Oct. 27, 2003) establishing comment cycle and soliciting comment on the new Verizon petition requesting forbearance from application of Section 271 (Public Notice).

[3] 47 C.F.R. §§1.415 and 1.419.

[4] Letter from Susanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Michael Powell, Chairman, and Kathleen Abernathy, Kevin Martin, Michael Copps and Jonathan Adelstein, Commissioners, Federal Communications Commission, CC Docket No. 01-338 (filed Oct. 24, 2003) (Verizon October 24 Ex Parte Letter or New Petition). The FCC has indicated that it chooses to treat the Verizon October 24 Ex Parte Letter as a new forbearance petition, after it denied Verizon's initial forbearance petition in this same proceeding.

Section 251 of the Act.[5] Because Verizon's New Petition narrows and simplifies the range of issues that were before the Commission in Verizon's initial forbearance petition,[6] the substance of the comments and reply comments filed by USTA previously on the Initial Petition remain relevant and applicable to the forbearance requested in the New Petition. Rather than repeat here the arguments made in comments filed on September 3, 2002 and in reply comments filed on September 18, 2002 on the Initial Petition, USTA attaches copies of these comments and reply comments.

In addition to the attached comments and reply comments, USTA emphasizes that in the Triennial Review Order,[7] the Commission exempted certain broadband-specific elements from Section 251 unbundling obligations because it found that forced sharing of those elements is both unnecessary for intramodal competition and inimical to the prospects for efficient broadband investment by incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs) alike. Such obligations, no matter what their statutory provenance, would thus thwart the Commission's goal of ensuring a wireline broadband alternative to cable modem service, which increasingly occupies "a leading position in the [broadband] marketplace,"[8] and threatens to monopolize it altogether. As explained in the Verizon October 24 Ex Parte Letter, the Triennial Review Order establishes the complete predicate for forbearance from any residual unbundling obligation that might otherwise be found to apply to such elements under a wooden

[5] *See* Verizon October 24 Ex Parte Letter at 1.

[6] *See* Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c), CC Docket No. 01-338 (filed July 29, 2002) (Initial Petition).

[7] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and FNPRM, CC Docket No. 01-338, FCC 03-36 (rel. Aug. 21, 2003) (Triennial Review Order or TRO).

[8] TRO ¶ 291.

application of Section 271. A finding that such obligations persist under Section 271, after they have been eliminated as anti-investment and anti-consumer under section 251, is a reason to grant forbearance from those obligations under all three criteria of Section 10(a). It is not, as several CLECs submit, a coherent basis for reflexively preserving whatever obligations Section 271 is thought to impose in the absence of forbearance.

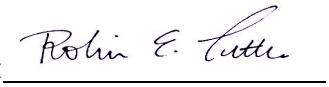
Much of the opposition to Verizon's forbearance request is thus reduced to the claim that the Commission did not really mean what it said when it took these elements off the table under Section 251. Specifically, in attacking the basis for forbearance under Section 10(a), the opponents manage only to quarrel with the Commission's twin policy findings that compelled unbundling of broadband-specific elements is both unnecessary for competition and affirmatively harmful to the public interest in the development of alternatives to cable modem service. Although the opponents to Verizon's forbearance petition contend otherwise, those two findings apply as much to copper-fiber "hybrid" loops as to "fiber to the home" facilities. The Commission explicitly "disagreed" with the CLEC argument "that, without unbundled access to hybrid loops, competitive LECs will not be able to serve certain customers," and it "determine[d] that unbundled access to incumbent LEC copper subloops" via remote terminal collocation, combined with the "broad availability of TDM-based loops," is more than sufficient to "provide competitive LECs with a range of options for providing broadband capabilities."[9] These and other findings in the Triennial Review Order provide the complete answer to the CLECs' various contentions that forbearance is unjustified under the standards of Section 10(a).

For the reasons state above and those stated previously in the attached comments and reply comments, USTA urges the Commission to grant Verizon's New Petition.

[9] TRO ¶ 291 and n.839; *see also id*. ¶ 295.

Respectfully submitted,

**UNITED STATES TELECOM ASSOCIATION**

By: 

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November 26, 2003

## CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on November 26, 2003, these Reply Comments of The United States Telecom Association were electronically filed with the FCC through its Electronic Comment Filing System and were electronically delivered to the service list below.

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**COMMENTS OF THE**
**UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA),[10] through the undersigned and pursuant to the *Public Notice* released by the Federal Communications Commission's (FCC's or Commission's) Wireline Competition Bureau (WCB)[11] and pursuant to sections 1.415 and 1.419 of the Commission's rules,[12] hereby submits its comments on the Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c) (Petition). In its Petition, Verizon seeks forbearance from being required to comply with certain items on the Section 271 checklist[13] – *i.e.*, forbearance from being required to offer certain network elements, which incumbent local exchange carriers (ILECs) are required to offer in order to demonstrate that the local market is open to competition before they can provide in-region interLATA telecommunications services. Verizon's request for this forbearance hinges on the Commission's findings in its *UNE Triennial Review* proceeding.[14] Verizon explains that if the

[10] USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.
[11] *Public Notice*, CC Docket No. 01-338, DA 02-1884 (rel. Aug. 1, 2002) soliciting comment on the Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c).
[12] 47 C.F.R. §§1.415 and 1.419.
[13] 47 U.S.C. §271(c)(2)(B).
[14] *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361, 16 FCC Rcd 22781 (2001) (*UNE Triennial Review*).

Commission finds in that proceeding that certain network elements do not meet the Section 251(d)(2) standard for mandatory unbundling, then the corresponding items on the Section 271 checklist should be deemed satisfied.[15] USTA asserts that granting the relief requested will not harm competition, but rather will facilitate facilities-based competition. USTA supports the requested relief and urges the Commission to grant the Petition.

## DISCUSSION

Section 271 of the Telecommunications Act of 1996 (1996 Act) prevents regional Bell operating companies (RBOCs) from providing in-region interLATA services until either a facilities-based competitor has entered into an interconnection agreement, which has been approved pursuant to Section 252, for access and interconnection to an RBOC's network facilities or until 10 months after the enactment of the 1996 Act if no carrier has requested such access and interconnection.[16] In order to demonstrate that it is offering or providing access and interconnection and that the local market is open to competition, an RBOC must satisfy the competitive checklist set forth in Section 271(c)(2)(B). Having satisfied the checklist, an RBOC can provide in-region interLATA service.

The checklist contains, among other things, requirements that RBOCs offer and provide certain network elements, which correspond to certain network elements that are required pursuant to the Commission's unbundling rules.[17] In its *UNE Triennial Review* the Commission is evaluating its network element unbundling rules and considering whether there should be any changes to those rules.[18] Switching, dedicated transport, high-capacity loops, and signaling are

[15] *See* Petition at 3, 7.
[16] *See* 47 U.S.C. §§271(c)(1)(A) and (B).
[17] *See* 47 C.F.R. §51.319.
[18] *See generally UNE Triennial Review*. In its Comments and Reply Comments in the *UNE Triennial Review*, USTA recommended that the Commission remove switching, dedicated transport, high-capacity loops, and the high frequency portion of the loop from the unbundled network element (UNE) list, emphasizing that these elements are

the network elements at issue in this Petition. If the Commission determines that ILECs are no longer required to unbundle any of these network elements, then the Commission will have determined that such elements are competitively available, either through third-party suppliers, self-provisioning, or inter-modal sources. Furthermore, since the 1996 Act only requires an ILEC to make a network element available to its competitor if the element is necessary and if the competitor would be impaired without access to such element, then a determination that an element is no longer necessary or that lack of such an element would not impair a competitor – because the element is competitively available – is persuasive evidence that the local market cannot be harmed if ILECs are not required to provide such element. Accordingly, if there is no need for ILECs to provide a network element to enable competitors to compete, then there is no need to require ILECs to provide such an element as a prerequisite to enter the in-region interLATA market. More specifically, if a network element is no longer on the Commission's unbundled network element (UNE) list, then the requirements of Section 271 are not undermined by the forbearance from requiring compliance with the checklist item that corresponds to the network element that was eliminated from the UNE list.

Removal of a network element from the UNE list is an act of recognition that facilities-based competition is growing. However, enforcing the requirement to provide a network element pursuant to Section 271(c)(2)(B) when the corresponding network element has been eliminated from the UNE list (because it is no longer required pursuant to Section 251(d)(2)) continues to foster competitors' reliance on the ILECs' facilities and discourages competitors from building their own facilities, resulting in less facilities-based competition. Thus, the Commission's forbearance from requiring ILECs to comply with certain items on the

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readily available through third-party suppliers, self-provisioning, and inter-modal sources. *See* USTA Comments at

competitive checklist of Section 271(c)(2)(B) when the corresponding network element has been eliminated from the UNE list will facilitate growth of facilities-based competition.

For these reasons, USTA supports Verizon's request that if the Commission eliminates the unbundling requirements for switching, dedicated transport, high-capacity loops, and/or signaling, then Commission should forbear from requiring compliance with the corresponding item on the competitive checklist – *i.e.*, items four through six and item ten of Section 271(c)(2)(B).[19] By supporting this regulatory forbearance, USTA is not suggesting that carriers' independent contractual obligations for provision of any of these network elements through an interconnection agreement should be abrogated by such regulatory forbearance. On these bases, USTA urges the Commission to grant Verizon's Petition.

Respectfully submitted,

**UNITED STATES TELECOM ASSOCIATION**

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September 3, 2002

6-9 and USTA Reply Comments at 9.
[19] *See* 47 U.S.C. 271(c)(2)(B)(iv-vi) and (x).

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The United States Telecom Association (USTA),[20] through the undersigned and pursuant to the *Public Notice* released by the Federal Communications Commission's (FCC's or Commission's) Wireline Competition Bureau (WCB)[21] and pursuant to sections 1.415 and 1.419 of the Commission's rules,[22] hereby submits its reply comments in the above-docketed proceeding. USTA filed comments in this proceeding on September 3, 2002, wherein it urged the Commission to grant the Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c) (Petition). In these reply comments, USTA addresses the impact that the competitive availability of certain network elements has on the application of Section 271 requirements.

## DISCUSSION

Some commenters argue that the requirements of Section 271, which provide competitors with access to certain Bell Operating Company (BOC) facilties, provide necessary safeguards or serve as a necessary safety net to address dangers associated with BOC provision of in-region

[20] USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.
[21] *Public Notice*, CC Docket No. 01-338, DA 02-1884 (rel. Aug. 1, 2002) soliciting comment on the Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c) (*271 Checklist Forbearance*).

long distance service.[23] The alleged safeguards of checklist items four through six and item ten of Section 271(c)(2)(B),[24] which require BOCs to unbundle switching, dedicated transport, high-capacity loops, and signaling, are not necessary if the Commission determines that incumbent local exchange carriers (ILECs) are no longer required to unbundle these same elements pursuant to Section 251(d)(2). If the Commission finds in its *UNE Triennial Review* proceeding[25] that these elements are competitively available – either through third-party providers, self provisioning, or inter-modal sources – then competitors do not need mandatory access to these elements, as required by Section 271(c)(2)(B), to compete with ILECs, generally, or BOCs, specifically. Moreover, the competitive availability of these elements negates any need to require them under Section 271(c)(2)(B) to address the risks of remonopolization of long distance markets.

Another commenter cites to the Supreme Court's decision in *Verizon Communications, Inc. v. FCC*,[26] noting that "some 'expensive facilities' owned by the BOCs are 'unlikely to be duplicated,' and certainly not by more than a few competitors,"[27] as evidence that competitors "will continue to need to use resale or to lease network elements to gain a foothold" when

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[22] 47 C.F.R. §§1.415 and 1.419.
[23] *See* WorldCom Comments at 4 and AT&T Comments at 6.
[24] *See* 47 U.S.C. 271(c)(2)(B)(iv-vi) and (x).
[25] *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361, 16 FCC Rcd 22781 (2001) (*UNE Triennial Review*).
Contrary to the claim of some commenters, the Petition is ripe for review and consideration by the Commission. The Petition is tied to the Commission's decision in the *UNE Triennial Review* proceeding, in which it is evaluating its network element unbundling rules and considering whether there should be any changes to the rules. Not only has the Commission indicated that it intends to issue a decision in this proceeding by the end of the year, but a decision by then is necessary given the partial stay recently issued by the U.S. Court of Appeals for the DC Circuit in *USTA v. FCC*, which will be lifted after January 2, 2003 and which would vacate the Commission's *UNE Remand* and *Line Sharing* Orders.
[26] *Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1646 (2002).
[27] *See* PACE Comments at 13, *quoting Verizon Communications, Inc. v. FCC*, 122 S.Ct. at 1668.

entering new markets.[28] Yet, this claim obfuscates what the Supreme Court said. While the Supreme Court noted that some facilities (*i.e.*, network elements) may not be duplicated by competitors because of their expense, the Supreme Court certainly did not make any broad-based statements about what those network elements would be. Nor did the Supreme Court dictate that any particular network elements would remain subject to mandatory unbundling in perpetuity. As USTA noted in its Comments and Reply Comments in the *UNE Triennial Review* proceeding, there are competitive alternatives to the network elements that are the subject of this Petition.[29] In other words, these network elements have been duplicated. Accordingly, these are not the types of network elements for which the Supreme Court intended continued mandatory unbundling.

In sum, if the Commission removes a network element from the unbundled network element list pursuant to Section 251(d)(2), it is acknowledging that such element is competitively available and that facilities-based competition is growing. Forbearance from requiring compliance with Section 271(c)(2)(B) for a network element that has been delisted pursuant to Section 251(d)(2) discourages competitors from unnecessary, continued reliance on BOCs'

[28] *See* PACE Comments at 13.
[29] *See* USTA Comments, *UNE Triennial Review*, at 6-9 and USTA Reply Comments, *UNE Triennial Review*, at 9. *See also* USTA Comments, *271 Checklist Forbearance*, at 3-4 fn.9.

facilities. Likewise, forbearance fosters competition by encouraging competitors to build their own facilities or to seek out competitive alternatives.

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